PP v. MOHAMAD IBRAHIM ROSLI

HIGH COURT MALAYA, GEORGETOWN
MOHD RADZI ABDUL HAMID JC
[CRIMINAL APPEAL NO: PA-42LB-10-04-2019]
6 NOVEMBER 2019

CRIMINAL LAW: *Corrosive and Explosive Substances and Offensive Weapons Act 1958 – Section 6 – Possession of taser – Whether offensive weapon – Whether listed under 'scheduled weapon' under Second Schedule – Whether should have been subjected to examination by forensic department – Whether failure rendered charge defective – Whether caused prejudice to accused person*

CRIMINAL PROCEDURE: *Charge – Framing of – Possession of taser – Charge under s. 6 of Corrosive and Explosive Substances and Offensive Weapons Act 1958 – Whether taser offensive weapon – Whether listed under 'scheduled weapon' under Second Schedule – Whether should have been subjected to examination by forensic department – Whether failure rendered charge defective – Whether should have been charged under s. 7 – Whether caused prejudice to accused person – Whether error remediable under s. 422 of Criminal Procedure Code*

The appellant was charged for offence under s. 6 of the Corrosive and Explosive Substances and Offensive Weapons Act 1958 ('Act') for the possession of a taser. During trial, SP1 and SP2, the prosecution witnesses identified the taser based on their own opinion and understanding of what a taser is and had individually tested the taser. At the end of the prosecution case, the Sessions Court Judge ('SCJ') held that no *prima facie* case had been established against the respondent on the grounds that: (i) the instrument was not proven to be a taser because it was not submitted to the forensic department for examination and determination; and (ii) there was a defect in the charge on the basis that a taser is a weapon listed under the Second Schedule of the Act and therefore the respondent should have been charged under s. 7 of the Act instead of s. 6. The failure caused prejudice to the respondent in preparing his defence at the trial. Hence, this appeal by the prosecution on the grounds that: (i) the instrument should be subjected to examination by the forensic department for determination on whether or not the instrument was a taser; (ii) rejecting the testimony of the witnesses for the prosecution in proving that the instrument was a taser; and (iii) the respondent should have been charged under s. 7 and not under s. 6 of the Act.

Held (amending charge from one under s. 6 to s. 7; remitting case to Sessions Court):

(1) Section 2 of the Act defines an offensive weapon as including any instrument, if used as a weapon, is likely to cause hurt. The same section defines 'scheduled weapon' as any offensive weapon specified in the Second Schedule. Taser is in the Second Schedule, and therefore, the law classifies taser as an offensive weapon. The Act does not make a

specific definition regarding the features of a taser other than being an instrument using battery or electricity or some other form of power. Therefore, an expert opinion of an armament or forensic was not required to determine the feature and functionality of a taser before it could be proven to be a taser. (paras 15, 16 & 18)

(2) The evidence of the investigation officer or arresting officer on whether or not the instrument confiscated is a taser based on the common knowledge of what a taser is and that it is operated by battery or electricity or any other form of power would be sufficient proof. SP1 and SP2 had the knowledge of what a taser is and they both tested the instrument. They both confirmed that when switched on, the instrument produced electrical current and SP2 additionally stated that there were sparks emitted by the instrument. Therefore, the trial judge had misdirected himself in rejecting the evidence of SP1 and SP2 and in deciding that the instrument was not proven to be a taser because it was not sent to the forensic department for a determination of the matter. (paras 18 & 23)

(3) The principle of statutory interpretation is that a special provision derogates from the general provision and the former must be interpreted strictly and a general provision cannot remove special provision. Therefore, for the offence of possession of a taser, an accused must be charged under s. 7 of the Act. Charging an accused under s. 6 of the Act would be an error as the accused will face the punishment of whipping in addition to imprisonment when that is clearly not intended by the law for the offence of possession of taser under s. 7 of the Act. Therefore, there was an error in charging the respondent under s. 6 of the Act. However, the error is remediable under s. 422 of the Criminal Procedure Code and hence, the SCJ erred in refusing to exercise his powers to amend the charge to an offence under s. 7 of the Act. (paras 21, 22 & 27)

Case(s) referred to:

Lee Weng Sang v. PP [1975] 1 LNS 84 HC ***(refd)***

Pakas Rao Applanaidoo & Ors v. Pendaftar Pertubuhan Malaysia & Ors [2015] 8 CLJ 521 CA ***(refd)***

PP v. Muniandy [1963] 1 LNS 96 HC ***(refd)***

Ravindran Ramasamy v. PP [2015] 3 CLJ 421 FC ***(refd)***

Yu Kim Seng v. PP [2008] 4 CLJ 95 HC ***(refd)***

Legislation referred to:

Corrosive and Explosive Substances and Offensive Weapons Act 1958, ss. 2, 6, 7, Second Schedule

Criminal Procedure Code, ss. 156, 422

For the appellant - JG Kaameni Jayaraman; DPP

For the respondent - R Sankra Krishna; M/s R Sankra Krishna & Co

Reported by S Barathi

JUDGMENT

Mohd Radzi Abdul Hamid JC:

Matter Before This Court

[1] This an appeal by the appellant against the decision of the Sessions Court in acquitting and discharging the respondent at the end of the prosecution's case.

Background

[2] The respondent was charged for an offence under s. 6 of the Corrosive and Explosive Substances and Offensive Weapons Act 1958 ("Act") for the possession of a taser.

[3] The charge ("charge") reads as follows:

> Bahawa kamu pada 24hb. November 2015 jam lebih kurang 4.00 pagi bertempat di Jalan Burma, di daerah Timur Laut di dalam negeri Pulau Pinang didapati dalam milik kamu senjata berjadual, iaitu sebuah alat renjatan elektrik tanpa kebenaran yang sah mengikut undang-undang atau bagi maksud yang sah. Oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 6(1) Akta Bahan Kakisan dan Letupan dan Senjata Berbahaya 1958.

[4] It is the prosecution's case that on 24 November 2015 at around 4am the respondent together with another male was apprehended by SP2 who was on patrol along Jalan Burma, Pulau Pinang together with six other officers. PW2 had stated in his witness statement PSP2 that upon doing a body search on the respondent, he discovered an instrument in the form of a taser in the front right pocket of his trousers. The respondent was detained and consequently charged under the Act for having in his possession an offensive weapon.

The Trial

[5] The prosecution called two witnesses, SP1 who was the assistant investigation officer and SP2, who was the arresting officer. It was established during the trial that exh. P8 that is the taser was not submitted to a forensic examination. SP1 and SP2 stated that the fact P8 is a taser was based on their own opinion and understanding of what P8 is. SP1 and SP2 said during their respective cross-examination that they had individually tested the taser. SP1 stated that when the taser was switched on it produced an electrical current and SP2 stated that when he switched on, the taser, it produced a sound that suggested there was electrical current and sparks were visible. SP2 stated that he did not know how much voltage the taser produced and if it could cause harm to a human body but he was certain that P8 could produce electrical current.

[6] At the end of the prosecution's case, learned counsel for the respondent orally submitted on the issues of (i) ownership of the motorcycle PLG 1381 that was ridden by the respondent; (ii) the trousers in which the taser was discovered was not produced as evidence by the prosecution; (iii) the taser was not subject to a forensic examination and therefore whether P8 is in fact a taser was not proven, and (iv) the exhibits storekeeper was not called to give evidence to prove that P8 was in fact confiscated from the respondent.

[7] The appellant in their written submission briefly submitted that (i) possession of the taser was proven; and (ii) SP1 and SP2 had tested the taser and testified that it is an offensive weapon that can cause hurt. The appellant did not however submit on the issue of whether the exh. 8 needed to be examined by a forensic expert before it can be proven to be a taser.

Decision Of The Trial Court

[8] At the end of the prosecution's case, the learned Sessions Court Judge ("SC Judge") held that there was no *prima facie* case against the respondent for the following reasons:

(i) The instrument was not proven to be a taser because it was not submitted to the Forensic Department for examination and determination; and

(ii) There was a defect in the charge on the basis that a taser is a weapon listed under the Second Schedule of the Act and therefore the respondent should have been charged under s. 7 of the Act instead of s. 6. That failure caused a prejudice to the respondent in preparing his defence at the trial.

[9] The appellant being dissatisfied with the decision of the learned SC Judge now appeals to this court.

The Grounds Of Appeal

[10] The appellant's grounds of appeal are as found at p. 7 of vol. 1 of the appeal record. The appeal primarily states that the learned SC Judge had erred in fact and in law in deciding the following:

(i) that the instrument should be subjected to examination by the Forensic Department for determination on whether or not the instrument is a taser;

(ii) rejecting the testimony of the witnesses for the prosecution in proving that the instrument is a taser; and

(iii) that the respondent should have been charged under s. 7 and not s. 6 of the Act.

The Submissions

By The Appellant

[11] In her submissions, the Deputy Public Prosecutor acting for the appellant submitted as follows:

(i) The nature and purpose of a taser is inherently clear and obvious. Since there is no definition of a taser under the Act, then the definition that should apply is based on the common understanding of what a taser is.

(ii) The Act does not require an expert opinion or determination by the Forensic Department on what amounts to a taser and the fact that the Act have listed taser in the Second Schedule it is self-explanatory that a taser is an offensive weapon.

(iii) Section 6 of the Act is a general provision and therefore whether an offending item amounts to an offensive weapon must be decided by the court and not by an expert. For that reason, the court should have accepted the testimonies of SP1 and SP2 as being sufficient to prove that the instrument is a taser.

(iv) There is no defect in the charge. By charging the respondent under s. 6 of the Act, the prosecution had merely placed upon itself the burden of proving that the item is an offensive weapon whilst such burden is absent under s. 7 of the Act since the offending item is listed in the Second Schedule. It was within the powers and discretion of the court to amend the charge if it was of the view that s. 7 was the more appropriate charge to be preferred against the respondent.

By The Respondent

[12] Learned counsel for the respondent submitted that the instrument, exh. P8 must be submitted to the Forensic Department for determination that it is in fact a taser. It was insufficient for SP2 to testify that the instrument is a taser since he is not an expert.

[13] Based on the aforesaid reasons, the prosecution had failed to discharge the burden of proving an essential ingredient of the offence that is the instrument is an offensive weapon.

Issues Before This Court

[14] There are only two primary issues to be decided by this court:

(i) Whether the determination of whether the instrument is a taser must be done by the Forensic Department or can that determination be made by the court after considering the oral evidence of the investigation officer or arresting officer; and

(ii) Whether the fact that a taser is listed in the Second Schedule of the Act requires the charge to be made under s. 7 of the Act and therefore when the respondent was charged under s. 6 of the Act the charge was rendered defective.

Deliberations On The Law

On The Determination Of The Offending Item As A Taser

[15] As defined by s. 2 of the Act an offensive weapon includes any instrument if used as a weapon is likely to cause hurt. The same section also defines "scheduled weapon" as any offensive weapon specified in the Second Schedule. Taser is in the Second Schedule and therefore, the law classifies taser as an offensive weapon. The Act does not provide any definition of a taser. Looking at the Second Schedule of the Act, taser is grouped together with other items that are operated by battery or electricity or any form of power:

> 12. Any Patrolite, Stun Gun, Taser, Control Club or any such similar instrument, device or equipment operated by battery or electricity or any form or power.

[16] Notwithstanding its inclusion in the Second Schedule of the Act, must a taser require forensic examination and determination to prove that it is in fact a taser? In this court's view, it does not. The Act does not make a specific definition regarding the features of a taser other being an instrument using battery or electricity or some other form of power. The Act does not define taser as how the Arms Act 1960 defines "arms". Under the Arms Act 1960, an "arm" is defined taking into account certain functions and adaptability:

> "arm" means any lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged, or which can be adapted for the discharge of any such shot, bullet or other missile, and any weapon of whatever description designed or adapted or which can be adapted for the discharge of any noxious liquid, gas or other thing, and includes an air gun, air pistol, automatic gun, pistol and any component parts of any such weapon, and any accessory to those weapons designed or adapted to diminish the noise or flash caused by firing the weapon; ...

[17] As such, in proving whether for example, a gun amounts to an arm under the Arms Act 1960, proof of serviceability of the gun is relevant and needs to be proven through evidence of an armament or forensic expert. In the case of *Lee Weng Sang v. PP* [1975] 1 LNS 84; [1976] 1 MLJ 82**,** Hashim Yeop A Sani J stated as follows:

> [1] ... The word "firearm" is used in the first charge itself which is the word used to create the offence under section 8 of the 1971 Act. The word "firearm" is also defined in section 2 of the 1971 Act to mean "any lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged by means of an

> explosive charge, and includes a bomb or grenade containing an explosive charge." The word "discharge" is also defined in that Act. The Firearms (Increased Penalties) Act, 1971 is certainly a penal Act and therefore section 8 must be strictly construed and must be read in conjunction with the definition of section 2 of the Act. Therefore for an offence to be created under section 8 of that Act it must be shown that the firearm concerned is *capable* of discharging any shot, bullet or other missile by means of an explosive charge which simply means that the firearm is in a serviceable condition.

[18] Therefore, since the Act does not provide for a definition of a "taser" in the way "arm" is defined under the Arms Act 1960, it is this court's view that an expert opinion of an armament or forensic is not required to determine the feature and functionality of a taser before it can be proven to be a taser. The evidence of the investigation officer or arresting officer on whether or not the instrument confiscated is a taser based on the common knowledge of what a taser and that it is operated by battery or electricity or any other form of power would be sufficient proof of the matter unless based on the facts of a case the court finds otherwise.

Offence Of Possession Under Sections 6 And 7 Of The Act

[19] Section 7 and the Second Schedule of the Act have specifically listed certain items to be offensive weapons and therefore, it follows that any instrument or thing that is not included in the Second Schedule will then be subject to a determination of fact on whether under the circumstances of each case, such item or instrument is an offensive weapon. As stated by Suffian J in the case of *Public Prosecutor v. Muniandy* [1963] 1 LNS 96; [1963] 1 MLJ 147:

> Contrasting the two definitions, it would seem that in Malaya it is irrelevant to consider whether or not the particular weapon was made or adapted for use for causing injury to the person. A vegetable knife has not been made for use for causing injury to the person but it would appear to be an offensive weapon, for the sole test here is whether, if used as a weapon of offence, such a knife is likely to cause hurt. Secondly, our definition, unlike that in England, says nothing about the intention of the person who has the weapon; nevertheless intention is, in my view, relevant when considering whether or not he had lawful authority or he had it for a lawful purpose.

[20] By comparison, s. 6 focuses the offence to one of possession and control whilst s. 7 extends the offence to include manufacturing, selling, hiring, exposing for selling or hiring, lending or giving of a scheduled weapon. In terms of punishment, except for the additional punishment of whipping that is only provided under s. 6, both ss. 6 and 7 provide that a convicted person is liable to be sentenced to term of imprisonment of not less than five years and not more than ten years. It is clear therefore that a punishment under s. 6 is heavier than under s. 7 of the Act although the latter's scope is wider than the former.

[21] In this court's view, the principle of statutory interpretation that a special provision derogates from the general provision and the former must be interpreted strictly and a general provision cannot remove a special provision applies to this appeal. This principle of *generalibus specilia* derogate was referred to in the case of *Pakas Rao Applanaidoo & Ors v. Pendaftar Pertubuhan Malaysia & Ors* [2015] 8 CLJ 521; [2015] 5 MLJ 500 where the Court of Appeal said:

> [21] The maxim *generalibus specialia derogant* is a legal principle which implies that the special provision is one that derogates from the general provision and the special provision must be interpreted strictly in the case; and that a general provision cannot remove a special provision. It is a basic principle of statutory interpretation. It was referred to in *Public Prosecutor v. Chew Siew Luan* [1982] 2 MLJ 119 (FC), wherein Raja Azlan Shah CJ (Malaya) (as HRH then was) said:
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> > *... Generalibus specialia derogant* is a cardinal principle of interpretation. It means that where a special provision is made in a special statute, that special provision excludes the operation of a general provision in the general law. (See also *Public Prosecutor v. Chua Boew Hin).*

[22] It follows therefore, for the offence of possession of a taser, an accused must be charged under s. 7 of the Act. Charging an accused under s. 6 of the Act would be an error as an accused will be put in a position where he would face the risk of suffering the punishment of whipping in addition to imprisonment when that is clearly not intended by the law for the offence of possessing a taser under s. 7 of the Act.

This Appeal

Proof That The Instrument Is A Taser

[23] Applying the above deliberations to the facts of this appeal, this court finds that with regards to the issue of whether the confiscated instrument was a taser, the evidence of SP1 and SP2 clearly showed that they both had knowledge of what a taser is and they both tested the instrument. They both confirmed that when switched on, the instrument produced electrical current and SP2 additionally stated that there were sparks emitted by the instrument. This court therefore finds that the learned judge had misdirected himself when rejecting the evidence of SP1 and SP2 and in deciding that the instrument was not proven to be a taser because it was not sent to the Forensic Department for a determination on the matter.

Error Regarding The Charge

[24] On the issue of whether the respondent was correctly charged under s. 6 of the Act, this court finds that there was an error by the prosecution. The correct charge would have been under s. 7 of the Act. Notwithstanding this error, the question to be asked is whether the respondent was misled by this error and if there has been a failure of justice.

[25] The Federal Court in the case of *Ravindran Ramasamy v. PP* [2015] 3 CLJ 421; [2015] 6 MLJ 509 referred to a string of cases in discussing the question of errors and omissions in a charge and the application of ss. 156 and 422 of the CPC. The learned Jeffrey Tan FCJ in delivering the judgment of the Federal Court said:

> [27] Pursuant to s. 156 of the CPC, 'no error in stating the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded, at any stage of the case, as material unless the accused was in fact misled by that error or omission' (the Indian equivalent, s. 215 of the Indian Criminal Procedure Code, ends with the words 'and it has occasioned a failure of justice'). However, in view of s. 422, for an error or omission to be material, it is not enough that the accused has been misled; there must also be a failure of justice. 'Whether any court should apply s. 422 aforesaid will depend, among other things, on whether the irregularity involves the breach of a principle of general importance to the administration of criminal justice. If it does, the court would not apply s. 422, as this appears to us to be the same thing as the irregularity having occasioned a failure of justice' *(Yap Sing Hock & Anor v. Public Prosecutor* [1992] 2 MLJ 714 at p 725 per Peh Swee Chin SCJ, later FCJ, delivering the judgment of the court).
>
> [28] It could also be noted that the 'error' alluded to in s. 156 of the CPC is the error in stating the offence or the particulars required to be stated in the charge, and not the error in stating the ingredients of an offence. That important distinction, whether an error in stating the particulars or an error in stating the ingredients, must be drawn for the purposes of ss. 156 and/or 422 of the CPC. This is because where it was an error or omission in stating the ingredients of an offence, it had been consistently held by the courts that the accused would have been misled and that there must have been a failure of justice.

[26] Applying the above principle, this court finds that the error did not mislead the respondent with regards the ingredients of the offence. The respondent was clearly charged with possession of a scheduled weapon. Since a taser is a scheduled weapon, therefore for purposes of the Act a taser is an offensive weapon. The charge under s. 6 is therefore, *per se*, not wrong. However, since s. 7 of the Act is specific to a scheduled weapon, then that provision of the law should be the correct section under which the respondent should be charged. In the circumstances, since the ingredients to be proven in either s. 6 or s. 7 with regards to possession of a taser is not

dissimilar, the respondent was not prejudiced by an inability to prepare his defence and there has not been a miscarriage of justice that justified the learned judge in finding that the charge was defective. Furthermore, the punishment for an offence under s. 7 is lower compared to s. 6 and therefore a charge under s. 7 of the Act is clearly in the respondent's favor. As stated in the decision of *Yu Kim Seng v. PP* [2008] 4 CLJ 95; [2008] 8 MLJ 378:

> [4] ... The test which covers all errors and omission in a charge is not whether the error or omission is substantial or not. It is a question of fact and each case must depend on its own facts and circumstances ...

[27] This court therefore finds that there was an error in charging the respondent under s. 6 of the Act. That error however is remediable under s. 422 of the Criminal Procedure Code. It follows therefore, that the learned SC Judge erred in refusing to exercise his powers to amend the charge to an offence under s. 7 of the Act.

Decision

[28] After taking into account the facts of this appeal, submissions by both counsels for the appellant and respondent and evaluating the decision of the learned SC Judge, the charge is hereby amended from one under s. 6 to s. 7 of the Act and further finds that a *prima facie* case has been established against the respondent for that offence. This case is remitted to the Sessions Court before a different quorum for defence to be called.